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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Maria Veloz, a married woman dealing
with her sole and separate property,

Plaintiff,

v.

Green Tree Servicing, LLC, a Delaware
limited liability company,

Defendant.

Case No. 2:13-cv-00915-JJT

**Defendant Green Tree Servicing, LLC's
Motion for Judgment as a Matter of
Law**

(Assigned to Honorable John J. Tuchi)

Defendant Green Tree Servicing, LLC respectfully makes this Motion pursuant to Rule 50(a), Fed.R.Civ.P., and asks that the Court enter Judgment in its favor and against Plaintiff Maria Veloz as to all causes of action pending in this trial. Plaintiff has been fully heard in support of her claims for relief, but as a matter of law, no reasonable jury would have a legally sufficient evidentiary basis to find in favor of Plaintiff. As a result, Green Tree is entitled to have Judgment entered in its favor on each of the four causes of action.

1. Rule 50 Standard Is Met Here

Federal Rule of Civil Procedure 50(a) permits a party to move for judgment as a matter of law after the opposing party has been fully heard and prior to the submission of the case to the jury. Fed.R.Civ.P. 50(a). A district court can grant a Rule 50(a) motion for judgment as a matter of law when “there is no legally sufficient basis for a

1 reasonable jury to find for that party on that issue.” *Jorgensen v. Cassiday*, 320 F.3d
 2 906, 917 (9th Cir.2003) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S.
 3 133, 149, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)). “[I]n entertaining a motion for
 4 judgment as a matter of law, the court ... may not make credibility determinations or
 5 weigh the evidence.” *EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th
 6 Cir.2009) (alteration in original) (quoting *Reeves*, 530 U.S. at 150, 120 S.Ct. 2097).

7 Here, there is only one reasonable conclusion which can be reached by the jury.
 8 Based on the undisputed law which the jury is bound to apply, Plaintiff has not
 9 presented the jury with any evidence to support any of her claims for relief, let alone a
 10 claim for punitive damages. Judgment in favor of Green Tree is appropriate at this time
 11 without submitting the weight of the evidence to the jury.

12 **2. There Is No Legally Sufficient Basis To Find In Favor Of Plaintiff As To**
 13 **Count One – Violation of 12 U.S.C. § 2605(g)**

14 Without weighing the evidence, and instead taking all evidence which has been
 15 presented to the Court on its face, it becomes evident that as a matter of law, no
 16 reasonable juror could find for Plaintiff on Count One of her First Amended Complaint.
 17 There are two reasons for this. First, Plaintiff has not met her burden of proof to show
 18 liability, because as a matter of law, the undisputed actions of Green Tree are legally
 19 excused from liability because they followed directly the Code of Federal Regulations
 20 (“CFR”). Second, Plaintiff has not met her burden of proof to show she was damaged
 21 by any action of Plaintiff. Each reason justifies entry of judgment as a matter of law in
 22 favor of Green Tree.

23 **A. Plaintiff Has Not Met Her Burden Of Proof For Liability**

24 Plaintiff’s first claim for relief alleges a violation of 12 U.S.C. § 2605(g) for
 25 Green Tree’s alleged failure to pay Plaintiff’s homeowners’ insurance premium.
 26 Plaintiff’s claim fails as a matter of law because the evidence shows that Green Tree

1 made good faith attempts to obtain information from Plaintiff regarding renewal of the
2 homeowners' insurance policy (Exhibits 4; 40). The evidence also shows that Plaintiff
3 did not provide Green Tree with billing information for her homeowners' insurance
4 until – at the earliest – February 18, 2013. (Exhibit 5). Because by that point in time, the
5 insurance policy had already expired (Exhibit 9 - showing the policy expired on January
6 21, 2013), Green Tree had a reasonable basis to believe that Plaintiff's insurance was
7 cancelled or otherwise not renewed. As a matter of law, that is enough to legally excuse
8 any obligation of Green Tree to pay the insurance proceeds.

9 Additionally, Plaintiff has failed to present any admissible evidence that she, or
10 her representatives, provided Green Tree with the information necessary to timely pay
11 the insurance proceeds. The only evidence in the record on this point is the fact that as
12 soon as Green Tree received the necessary information from Plaintiff, it paid Mercury
13 the amounts that were requested. (Exhibits 16; 48-49). This evidence proves that Green
14 Tree acted reasonably, and within the confines of the Rules, as opposed to in a manner
15 contrary to RESPA.

16 On February 14, 2013, the Consumer Financial Protection Bureau (“CFPB”)
17 modified 12 CFR §1024.17(k), which interprets RESPA, to explain that there are
18 allowable scenarios where a mortgage servicer does not disburse funds for payment of
19 insurance, and has no liability for not doing so. Specifically, the CFPB chose to include
20 language in the Code of Federal Regulations that gives Green Tree the discretionary
21 ability to have “a reasonable basis to believe either that the borrower’s hazard insurance
22 has been canceled (or was not renewed),” and thus, no payment of insurance would be
23 required at that time. 12 CFR §1024.17(k)(5)(ii)(A).

24 The CFPB also issues official interpretations of Regulation X. According to the
25 CFPB, one example of this “reasonable basis” to believe that the homeowners’
26 insurance was not renewed, thereby rendering Green Tree not liable for its failure to

1 disburse funds to pay that insurance, is when: “A servicer does not receive a payment
 2 notice by the expiration date of the borrower’s hazard insurance policy.” *See*
 3 [http://files.consumerfinance.gov/f/201301_cfpb_final-rule_servicing-respa-](http://files.consumerfinance.gov/f/201301_cfpb_final-rule_servicing-respa-interpretations.pdf)
 4 [interpretations.pdf](http://files.consumerfinance.gov/f/201301_cfpb_final-rule_servicing-respa-interpretations.pdf), last visited May 12, 2015. Good faith compliance with the CFPB
 5 commentary affords Green Tree protection from liability for the very claims Plaintiff
 6 has attempted to bring here. *See* 12 U.S.C. 2617(b) (“No provision of this chapter or the
 7 laws of any State imposing any liability shall apply to any act done or omitted in good
 8 faith in conformity with any rule, regulation, or interpretation thereof...”).¹

9 The facts of this case are undisputed regarding when the insurance policy
 10 expired. January 21, 2013 was the last date which Plaintiff’s policy with Mercury was in
 11 place. While there is some dispute regarding when Plaintiff advised Green Tree about
 12 her intention to renew the Mercury insurance policy, the evidence presented in this trial
 13 make it clear that even accepting Plaintiff’s unsupported statements at face value,
 14 Plaintiff still did not give Green Tree any notice of her intention to renew her
 15 homeowners’ insurance until after the expiration of the policy. It was completely
 16 reasonable for Green Tree to assume that the policy was cancelled or not renewed, since
 17

18
 19 ¹ Green Tree recognizes that this Court disagrees with the application of 12 CFR
 20 §1024.17(k) to this case. However, 12 USC §2617(a) explains that the CFPB “is
 21 authorized to prescribe such rules and regulations, to make such interpretations, and to
 22 grant such reasonable exemptions for classes of transactions, as may be necessary to
 23 achieve the purposes of this chapter.” *Id.* It then goes on to explain:

22 No provision of this chapter or the laws of any State imposing any
 23 liability shall apply to any act done or omitted in good faith in conformity
 24 with any rule, regulation, or interpretation thereof by the Bureau or the
 25 Attorney General, notwithstanding that after such act or omission has
 26 occurred, such rule, regulation, or interpretation is amended, rescinded, or
 determined by judicial or other authority to be invalid for any reason.

12 USC §2617(b). Thus, in furtherance of the stated purpose of RESPA, it appears that
 the application of the referenced CFRs are appropriate here.

1 the policy had already expired before any communication from Plaintiff regarding the
2 policy.

3 Thus, at the very least, any reasonable juror must believe that Green Tree had a
4 reasonable basis to believe that Plaintiff's homeowners' insurance was either cancelled
5 or not renewed by Plaintiff, since the record shows that Green Tree did not receive any
6 information from Plaintiff relating to that insurance policy prior to the expiration date of
7 the policy.

8 Because Green Tree made good faith efforts to obtain from Plaintiff the funds
9 necessary to pay the insurance premiums (Exhibits 4; 40), and because Plaintiff failed to
10 provide that information, Green Tree cannot be found to have violated 12 U.S.C.
11 §2605(g). Green Tree instead complied with the plain language of the loan documents,
12 which allowed it to obtain force placed insurance, to take the place of Plaintiff's unpaid,
13 and lapsed, Mercury policy. Plaintiff has not met its burden of proof to show that Green
14 Tree did anything improper in not renewing the Mercury Policy, and instead obtaining
15 its own, equivalent coverage for the Property.

16 In addition to there being no liability because Green Tree acted reasonably,
17 Plaintiff also has failed to introduce any evidence into the record that there was any
18 "penalty" to Plaintiff in the first instance, so as to trigger liability under the statute.
19 According to RESPA, Green Tree was required to pay Plaintiff's insurance "in a timely
20 manner as such payments become due." 12 USC §2605(g). The phrase "timely manner"
21 means "on or before the deadline to avoid a penalty, as long as the borrower's payment
22 is not more than 30 days overdue". 12 CFR §1024.17(k)(1). "Penalty" is another
23 defined term and means "a late charge imposed by the payee for paying after the
24 disbursement is due." 12 CFR §1024.17(b). Thus, the focus of the inquiry is (1) when
25 was the deadline to make a payment?; and (2) what was the penalty for missing that
26 deadline?

1 As stated previously, it is undisputed in the record that the deadline to renew
2 Plaintiff's insurance policy with Mercury was January 21, 2013. (Exhibit 41). Thus, the
3 only question for the jury would be whether or not Plaintiff was penalized for missing
4 that deadline. Pursuant to 12 CFR §1024.17(b), the regulatory definition of "penalty" is
5 "a late charge imposed by the payee for paying after the disbursement is due. It does not
6 include any additional charge or fee imposed by the payee associated with choosing
7 installment payments as opposed to annual payments or for choosing one installment
8 plan over another." *Id.* Because there was no late charge imposed on Plaintiff by
9 Mercury for any attempted policy renewal after January 21, 2013, there was no
10 statutorily defined "penalty" which occurred here. Without imposition of a penalty,
11 liability under §2605(g) does not exist as a matter of law.

12 Plaintiff has not met her burden of proof with respect to Count One – Violation
13 of §2605(g). Based on the application of the relevant statutes and regulations, Plaintiff
14 has failed to prove any necessary element of her claim for relief. Judgment should be
15 entered in favor of Green Tree as to Count One of the First Amended Complaint.

16 B. Plaintiff has not met her burden of proof for damages

17 In order to prevail on her claim under §2605(g) (or any of her RESPA claims),
18 Plaintiff must also prove actual damages. *See Ghuman v. Wells Fargo Bank, N.A.*, 2013
19 WL 552097 (E.D.Cal.2013); *Saldade v. Wilshire Credit Corp.*, 711 F.Supp.2d 1126
20 (E.D.Cal.2010).

21 It is "the traditional understanding that tort recovery requires not only wrongful
22 act plus causation reaching to the plaintiff, but proof of some harm for which damages
23 can reasonably be assessed." *Doe v. Chao*, 540 U.S. 614, 621, 124 S. Ct. 1204, 1209,
24 157 L. Ed. 2d 1122 (2004) (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen,
25 Prosser and Keeton on Law of Torts § 30 (5th ed.1984)). Plaintiff has failed to present
26

1 any admissible evidence of actual damages which have become part of the record in this
2 case.

3 In order to prove actual damages, Plaintiff was required to prove that but for the
4 actions of Green Tree, she would have not suffered the monetary damages she is
5 claiming. *See Allen v. United Fin. Mortgage Corp.*, No. 09–2507 SC, 2010 WL
6 1135787, at *5 (N.D.Cal). March 22, 2010) (the plaintiff must “point to some colorable
7 relationship between his injury and the actions or omissions that allegedly violated
8 RESPA.”). Plaintiff has not done this. Instead, the record shows that Plaintiff received
9 from the Assurant policy the entire amount of the cost to repair her kitchen, as appraised
10 by Assurant. (Exhibits 16; 23; 48-49). In order for Plaintiff to have proven that she was
11 damaged above and beyond the repair costs already paid to her, she was required to
12 present evidence that (1) additional damages were suffered to the Property; and (2)
13 those damages would have been remediated if she held her same homeowners’
14 insurance policy with Mercury Insurance as of the date of the water damage to the
15 Property. This proof does not exist.

16 First of all, Plaintiff has not shown any additional damage to the Property, other
17 than the claimed mold damage. However, the testimony from Plaintiff is unpersuasive
18 that there was a presence of mold on the Property as a result of the March 2013 leak.
19 Instead, the record shows that Plaintiff has owned the Property since 1993 (Exhibit 46),
20 and that Plaintiff has no way of knowing when the mold first appeared on the Property.

21 In addition, Plaintiff did not introduce any evidence or testimony that the
22 Mercury Insurance policy would have resulted in her receiving a larger payout than
23 what she obtained from Assurant, or that the repairs to the kitchen would have been
24 done sooner. As shown through the Mercury Insurance policy, Plaintiff would not have
25 received the excess compensation she has demanded Green Tree compensate her for.
26 (Exhibit 8).

1 Instead, Plaintiff attempts to play off the emotions of the jury in speaking about
 2 the timing of the repairs and “living through” the damage to her kitchen. But as should
 3 be apparent from the evidence, Green Tree is not responsible for, or otherwise involved
 4 with, the damage to Plaintiff’s kitchen. The only question regarding Green Tree’s role
 5 with damages should be whether or not the proven actions of Green Tree – which
 6 consist of asking Plaintiff for proof of her homeowners’ insurance (Exhibits 4; 40);
 7 timely paying Plaintiff’s homeowners’ insurance as soon as appropriate proof of
 8 insurance was provided; and retroactively placing homeowners’ insurance on the
 9 Property so that Plaintiff’s damages were covered (Exhibit 42) – caused any monetary
 10 damage to Plaintiff. The record is clear that it did not.

11 The burden was on Plaintiff to “provide evidence such that the jury is not left to
 12 speculation or guesswork in determining the amount of damages to award.” *McGlinchy*
 13 *v. Shell Chem. Co.*, 845 F.2d 802, 808 (9th Cir.1988) (quoting *Dolphin Tours, Inc. v.*
 14 *Pacifico Creative Serv., Inc.*, 773 F.2d 1506, 1509 (9th Cir.1985)). In this case,
 15 Plaintiff has no proof of damages. She has already been paid for the full amount of
 16 damage to the Property. (Exhibits 16; 23; 48-49). Because Plaintiff has not proven that
 17 she was damaged, in any way, due to any action of Green Tree, she has not met her
 18 burden of proof on damages and is legally incapable of judgment in her favor as to
 19 §2605(g). Judgment must then be entered in favor of Green Tree on this cause of action.

20 **3. There Is No Legally Sufficient Basis To Find In Favor Of Plaintiff As To**
 21 **Count Two – Violation of 12 U.S.C. § 2605(e)**

22 Without weighing the evidence, and instead taking all evidence which has been
 23 presented to the Court on its face, it becomes evident that as a matter of law, no
 24 reasonable juror could find for Plaintiff on Count Two of her First Amended Complaint.
 25 There are two reasons behind this. First, Plaintiff has not met her burden of proof to
 26 show liability, because as a matter of law, the undisputed actions of Green Tree are

1 legally excused from liability because they followed directly the Code of Federal
2 Regulations. Second, Plaintiff has not met her burden of proof to show she was
3 damaged by any action of Plaintiff. Each reason justifies entry of judgment as a matter
4 of law in favor of Green Tree.

5 A. Plaintiff has not met her burden of proof for liability

6 Plaintiff's second cause of action seeks relief for the failure of Green Tree to
7 respond to a QWR. Similar to Count One, Plaintiff has not met her necessary burden of
8 proof here. In particular, Plaintiff has not proven (1) that her writing constitutes a
9 Qualified Written Request as a matter of law; or (2) that the writing was sent to the
10 correct location, as required by Green Tree. Each of these inactions on the part of
11 Plaintiff excuses Green Tree from having to meet the strict deadline of acknowledging a
12 QWR, as set forth in §2605(e).

13 Under § 2605(e), a loan servicer has an obligation to act when it receives a QWR
14 from the borrower or borrower's agent "for information relating to the servicing of [the]
15 loan." 12 U.S.C. § 2605(e)(1)(A). However, the letter which Plaintiff refers to as a
16 "QWR" does not fall within the statutory definition of such.

17 Plaintiff's letter was written by her counsel. (Exhibit 18). It threatens to file a
18 lawsuit if Green Tree does not "immediately hire competent, licensed contractors to go
19 to my client's property to determine the extent of the damage, to remediate the mold and
20 to rebuild the kitchen." (*Id.*). The letter does not make any requests or inquiries
21 pertaining to the servicing of Plaintiff's loan by Green Tree. In fact, it does quite the
22 contrary. Plaintiff's letter makes numerous demands and threats, but poses no questions
23 (other than rhetorical ones). (*Id.*). This is not a letter which "includes a statement of the
24 reasons for the belief of the borrower, to the extent applicable, that the account is in
25 error or provides sufficient detail to the servicer regarding other information sought by
26 the borrower." 12 U.S.C. §2605(e)(1)(B)(ii). "Not all written requests from a borrower

1 to a servicer require a response.” *Au v. Republic State Mortgage Co.*, 948 F. Supp. 2d
 2 1086, 1103 (D. Haw. 2013). Plaintiff’s demand letter from her counsel is one of those
 3 letters that does not contain any of the elements to make it a QWR. It simply is not a
 4 QWR under the plain language of the statute.

5 In addition, a QWR cannot be “received” if it not directed to the proper party.
 6 Similarly, it cannot be a QWR at all if it is not properly addressed to the loan servicer.
 7 This is why the actions of Green Tree, to the extent that a QWR was even sent, are
 8 legally justified.

9 The record shows that Plaintiff was informed, on more than one occasion, where
 10 she was to direct any QWR letters. (Exhibit 43). The record also shows that the letter
 11 which Plaintiff claims to be a QWR was not directed to the proper address that Green
 12 Tree has designated for receiving QWRs. (Exhibits 18; 43). Plaintiff admits that nothing
 13 was sent by her or on her behalf to the proper QWR address.

14 The language in RESPA is silent on the question of *how* a QWR is to be
 15 conveyed to a mortgage servicer. 12 U.S.C. §2605(e). Other than imposing the
 16 obligation to make the request be “a written correspondence,” Congress declined to
 17 explain how the QWR was to be presented to Green Tree and other similarly situated
 18 servicers. *Id.* However, the CFR interpreting this section explains that “a servicer may
 19 establish a separate and exclusive office and address for the receipt and handling of
 20 qualified written requests”. 24 C.F.R. § 3500.21(e)(1)². By establishing a separate

21 _____
 22 ² The text of this Rule was removed effective July 16, 2014, because the Dodd-Frank
 23 Act transferred from HUD to the CFPB the authority to administer, enforce, and
 24 otherwise implement RESPA. Thus, HUD’s rules regarding RESPA, including Section
 25 3500.21, were vacated. However, they were still in effect in April 2013, when Plaintiff
 26 sent her supposed QWR, and thus, are to be applied to the facts of this case. In the
 alternative, the current rule, 12 CFR §1024.36(b), also allows Green Tree to establish a
 designated address for sending a written correspondence which is intended to be a
 QWR.

1 address for mailing any QWR to, and notifying Plaintiff of that address, Green Tree
2 complied with the relevant CFR in imposing a mailing condition on any written
3 correspondence which was intended to be a QWR. (Exhibit 43). It therefore is excused
4 from liability as a matter of law for not acknowledging the letter from Plaintiff's
5 counsel within five days of it being sent.

6 Finally, the record shows that Green Tree actually *did* timely respond to the letter
7 from Plaintiff's attorney. (Exhibit 51). Green Tree wrote to Ms. Hone on April 5, 2013,
8 just two days after her letter was sent. (*Id.*). The jury cannot reasonably conclude any
9 liability should attach for the actions of Green Tree, because there was no QWR,
10 because the letter was not directed to the correct location, and because Green Tree
11 actually responded to the letter in a timely manner.

12 B. Plaintiff has not met her burden of proof for damages

13 In order to prevail on her claim under §2605(e), Plaintiff must also prove actual
14 damages. *See Ghuman v. Wells Fargo Bank, N.A.*, 2013 WL 552097 (E.D.Cal.2013);
15 *Saldade v. Wilshire Credit Corp.*, 711 F.Supp.2d 1126 (E.D.Cal.2010). As shown in
16 Section 2(B), above, Plaintiff has not proven any damages, let alone damages which
17 relate to the failure of Green Tree to respond to a written request for information within
18 a finite period of time. The mere refusal of Green Tree to pay all amounts demanded by
19 Plaintiff upon receipt of Plaintiff's demand is not a basis for liability under RESPA for
20 an inadequate response to a QWR, nor does it somehow create actual damages. *See*
21 *Echeverria v. BAC Home Loans Servicing, LP*, 900 F.Supp.2d 1299 (M.D.Fla.2012),
22 affirmed 2013 WL 3752138. Because Plaintiff has not proven that she was damaged, in
23 any way, due to any action of Green Tree, she has not met her burden of proof on
24 damages and is legally incapable of judgment in her favor as to §2605(e). Judgment
25 must then be entered in favor of Green Tree on this cause of action.

4. There Is No Legally Sufficient Basis To Find In Favor Of Plaintiff As To Count Three – Violation of 12 USC §2605(k)/(l)

Count Three of the First Amended Complaint alleges a violation of 12 U.S.C. § 2605(k) and (l), premised on the theory that Green Tree failed to cancel the lender-place insurance on the Property. However, on cross-examination Plaintiff conceded that the policy placed by Green Tree with Assurant was cancelled in approximately April 2013, when Plaintiff finally provided Green Tree with proof of her own insurance. Plaintiff has also acknowledged that she only paid Green Tree approximately \$700 (or possibly less) towards the force-placed insurance, because the remainder was refunded to her escrow account after the Assurant policy was cancelled. No reasonable juror could conclude that Green Tree violated this statute, and thus, judgment as a matter of law should be entered for Green Tree.

5. There Is No Legally Sufficient Basis To Find In Favor Of Plaintiff As To Count Four – Negligence

Similar to the preceding RESPA claims, Green Tree is also entitled to judgment as a matter of law on Plaintiff's claim for negligence. Plaintiff has failed to introduce any admissible evidence to prove the mandatory elements of her claim for relief. In addition, Plaintiff has not proven that she was damaged as a result of any action on the part of Green Tree. Because the necessary evidence and testimony is not part of the record within Plaintiff's presentation of the case, judgment in favor of Green Tree as to count four of the First Amended Complaint should be entered.

A. Plaintiff has not met her burden of proof on liability for negligence

To recover in a negligence action, Plaintiff must prove each element of negligence – the existence of a duty, breach of that duty, causation, and damages. *Taeger v. Catholic Family & Cmty. Servs.*, 196 Ariz. 285, 294, ¶ 29, 995 P.2d 721, 730

1 (App. 1999). During the presentation of her case, Plaintiff has failed to establish that
2 Green Tree had any duty to her other than that which is articulated in RESPA.

3 This Court has previously concluded that if there is a duty of care which exists
4 between Green Tree and Plaintiff, it is one which is created under RESPA. (Dkt. 61).
5 However, as noted in the preceding sections, Plaintiff has not proven anything other
6 than Green Tree's compliance with its RESPA obligations. *See* Section 2(A), above. By
7 acting in compliance with the only legal duties which exist, Green Tree cannot have
8 been negligent in its actions relating to the payment of Plaintiff's homeowners'
9 insurance.

10 There is no common-law duty of care owed by Green Tree to Plaintiff,
11 independent of RESPA, under which Plaintiff can prevail on its negligence claim. "Duty
12 is an obligation requiring the defendant to conform to a certain standard of conduct in
13 order to protect others against unreasonable risks." *Gilbert Tuscan Lender, LLC v.*
14 *Wells Fargo Bank*, 232 Ariz. 598, 307 P.3d 1025, 1028 (App. 2013). Whether or not
15 this identified duty exists "is a matter of law for the court to decide." *Gipson v. Kasey*,
16 214 Ariz. 141, 143, 150 P.3d 228, 230 (2007) (citing *Markowitz v. Ariz. Parks Bd.*, 146
17 Ariz. 352, 356, 706 P.2d 364, 368 (1985)). As a matter of law, there is no cognizable
18 duty in particular that Green Tree owes to Plaintiff to "timely pay the insurance
19 premium." Plaintiff cannot meet her burden of proof to show the existence of any
20 common law duty.

21 This is because no "special relationship" exists between Plaintiff and Green Tree
22 out of which a duty of care should arise. "Duties of care may arise from special
23 relationships based on contract, family relations, or conduct undertaken by the
24 defendant." *Gipson*, 214 Ariz. at 145, ¶ 18, 150 P.3d at 232. As a practical matter, and
25 based on the facts presented at trial, Green Tree does not owe Plaintiff any particular
26 duties that could support a claim for negligence.

Public policy also does not create a duty of care between Plaintiff and Green Tree. In fact, it requires an opposite conclusion. There already is a litany of statutory language which governs the relationship between a mortgage servicer and a mortgagee. *See generally* RESPA, TILA, etc. The silence of Congress and the CFPB on the creation of any additional duties, which Plaintiff has asked this Court to impute in her negligence claim, is powerful evidence that Congress did not intend a duty of care, or a “special relationship” to exist between Green Tree and Plaintiff. *Wyeth v. Levine*, 555 U.S. 555, 575, 129 S. Ct. 1187, 1200, 173 L. Ed. 2d 51 (2009). By failing to meet her burden of proof to show the existence of any non-statutory duty between Green Tree and Plaintiff, judgment as a matter of law is appropriate here.

B. Plaintiff has not met her burden of proof on damages

Any claim for negligence requires proof of damages. *Amfac Distribution Corp. v. Miller*, 138 Ariz. at 152, 153, 673 P.2d 792, 793 (1983) (“[n]egligence alone is not actionable; actual injury or damages must be sustained before a cause of action in negligence is generated.”); *Saucedo ex rel. Sinaloa v. Salvation Army*, 200 Ariz. 179, 183, 24 P.3d 1274, 1278 (App. 2001). There is no proof of *any* damage to Plaintiff as a result of any action by Green Tree. *See* Section 2(B), above. Because Plaintiff has not proven Green Tree caused her to be damaged, or what those damages are, judgment as a matter of law should be entered in favor of Green Tree.

6. There Is No Legally Sufficient Basis To Present The Issue Of Punitive Damages To The Jury

As a threshold issue, damages for Plaintiff’s three RESPA-based causes of action do **not** allow for recovery of punitive damages. *See* 15 U.S.C. § 1640(a) (2009). Each of Plaintiff’s RESPA claims are derived from 12 U.S.C. §2605(f), which limits Plaintiff’s damages to “any actual damages to the borrower as a result of the failure.” 12 U.S.C. §2605(f).

1 Even utilizing Plaintiff's negligence theory, and even if the Court allows the
 2 negligence theory to be presented to the jury, there is no evidence in the record to allow
 3 punitive damages to be argued to the jury. Under Arizona law³, punitive damages may
 4 be recovered only under "special circumstances," and must be based on more than gross
 5 negligence. *Rawlings v. Apodaca*, 151 Ariz. 149, 162, 726 P.2d 565 (1986). Instead,
 6 "[p]unitive damages are an 'extraordinary civil remedy' that 'should be appropriately
 7 restricted to only the most egregious of wrongs.'" *Linthicum v. Nationwide Life Ins.*
 8 *Co.*, 150 Ariz. 326, 331, 723 P.2d 675, 680 (1986). The Arizona Supreme Court has
 9 held that "before a jury may award punitive damages there must be evidence of an 'evil
 10 mind' and aggravated and outrageous conduct." *Id.* (emphasis added). Plaintiff has not
 11 presented any evidence of any of these mandatory elements of her case for punitive
 12 damages.

13 In addition, Plaintiff's burden of proof to recover punitive damages is a higher
 14 standard than for compensatory damages – "recovery of punitive damages should be
 15 awardable only upon **clear and convincing evidence** of the **defendant's evil mind**."
 16 *Linthicum*, 150 Ariz. at 332, 723 P.2d at 681 (emphasis added). The rationale for
 17 applying a more stringent standard is simple: "A standard that allows exemplary awards
 18 based upon gross negligence or mere reckless disregard of the circumstances
 19 overextends the availability of punitive damages, and dulls the potentially keen edge of
 20 the doctrine as an effective deterrent of truly reprehensible conduct." *Id.*

21 In deciding whether punitive damages are awardable, the focus is on the mental
 22 state of Green Tree, because the purpose of punitive damages is to punish the
 23 wrongdoer and deter others from the same sort of conduct. *Linthicum*, 150 Ariz. at 332,
 24 723 P.2d at 68; *see also Sandpiper Resorts Dev. Corp. v. Global Realty Investments*,

25 ³ Punitive damages claims arising under state law are subject to state law standards for
 26 recovery. *See, e.g., Coughlin v. Tailhook Ass'n*, 112 F.3d 1052, 1056 (9th Cir. 1997).

1 LLC, 904 F. Supp. 2d 971, 986 (D. Ariz. 2012) (interpreting Arizona law). The mere
2 participation in the commission of a tort is not enough; for punitive damages to be
3 awarded, something more is required. *Rawlings v. Apodaca*, 151 Ariz. 149, 162, 726
4 P.2d 565, 578 (1986). Through her presentation of her case, Plaintiff has not presented
5 any evidence that Green Tree was consciously aware of the evil of its actions and the
6 spitefulness of its motives or its conduct was so outrageous, oppressive or intolerable in
7 that it creates a substantial risk of tremendous harm to others. *Id.*, 151 Ariz. at 163, 726
8 P.2d at 579. No reasonable juror could conclude that such evidence exists, because
9 Plaintiff has not put on **any** evidence of the mental state of Green Tree. Nor has Plaintiff
10 presented any evidence that would allow a jury to conclude the actions of Green Tree
11 were “evil”, “spiteful”, or otherwise intended to cause Plaintiff harm. At the very most,
12 Plaintiff has shown that Green Tree acted prudently and rationally given the information
13 it was provided by Plaintiff and her representatives. No other conclusion is possible
14 from the evidence before the jury.

15 In *Rawlings*, the Arizona Supreme Court instructed as follows: “We do not
16 believe that the concept of punitive damages should be stretched. We restrict its
17 availability to those cases in which the defendant’s wrongful conduct was guided by
18 evil motives.” *Rawlings*, 151 Ariz. at 162, 726 P.2d at 578. “Important factors to
19 consider when deciding whether a defendant acted with an evil mind include (1) the
20 reprehensibility of defendant’s conduct and the severity of the harm likely to result, (2)
21 any harm that has occurred, (3) the duration of the misconduct, (4) the defendant’s
22 awareness of the harm or risk of harm, and (5) any concealment of it.” *Hyatt Regency*
23 *Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 132, 907 P.2d 506, 518 (App.
24 1995) (citing *Thompson*, 171 Ariz. 550, 556, 832 P.2d 203, 209 (1992)). None of those
25 factors have been introduced, let alone proven, by Plaintiff in her case.
26

1 Plaintiff has identified that she wants “to punish Green Tree for its untimely
2 response to Plaintiff’s inquiries and failure to timely pay the Mercury Insurance
3 premium before Plaintiff’s homeowner’s insurance policy lapsed.” (Dkt. 83 at p. 11).
4 Yet Plaintiff has not presented any facts showing any action on the part of Green Tree
5 which even arguably rises above mere reckless disregard of the circumstances. *Id.*; see
6 also *Linthicum*, 150 Ariz. at 331, 723 P.2d at 680; *Gurule v. Illinois Mut. Life and*
7 *Casualty Co.*, 152 Ariz. 600, 603, 734 P.2d 85, 88 (1987).

8 Punitive damages are aimed “at retribution and deterring harmful conduct.”
9 *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492, 128 S.Ct. 2605, 2621, 171 L.Ed.2d
10 570 (2008). Nothing in the record shows that Green Tree’s actions towards Plaintiff
11 were willful. Indeed, the only evidence is that Green Tree acted according to its
12 standard policies and practices with respect to the payment of Plaintiff’s homeowner’s
13 insurance premium.

14 Punitive damages “are awarded only in the most egregious cases.” *Hudgins v.*
15 *Sw. Airlines, Co.*, 221 Ariz. 472, 486, 212 P.3d 810, 824 (App. 2009). This is not that
16 case. There is no clear and convincing evidence (let alone *any* evidence) that Green
17 Tree possessed an “evil mind” while engaging in aggravated and outrageous conduct.
18 *Linthicum*, 150 Ariz. at 331-332, 723 P.3d at 680-81. Instead, the record shows that
19 Green Tree was able to obtain for Plaintiff, at little cost to her, retroactive insurance
20 coverage which resulted in payment to Plaintiff of nearly \$25,000 for full repairs to her
21 property. (Exhibits 48; 49).

22 **7. Judgment For Green Tree Is Appropriate**

23 In view of the foregoing, and because Plaintiff has not met her burden of proof to
24 demonstrate that there is a legally sufficient basis for a reasonable jury to find in her
25 favor for any of her causes of action, including for punitive damages, judgment as a
26

1 matter of law should be entered in favor of Green Tree on all claims in the First
2 Amended Complaint.

3 DATED this 20th day of May, 2015.

4
5 **Jaburg & Wilk, P.C.**

6 /s/ Laura Rogal
7 David L. Allen
8 Laura A. Rogal
9 Attorneys for Defendant

10 ***Certificate of Service***

11 I hereby certify that on the 20th day of May, 2015, I electronically transmitted the
12 attached document to the Clerk's Office using the CM/ECF System for filing, and for
13 transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

14 Mary T. Hone, Esq.
15 LAW OFFICE OF MARY T. HONE, PLLC
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/s/ Debra Gower